91-332

Supreme Court, U.S.
FILED
AUG 20 1991
OFFICE OF THE CLERK

No. 91-

In The

Supreme Court of the United States

October Term, 1991

HECTOR SAUCEDO-MESA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD B. LIND
McCOSTIS & LIND
Attorneys for the Petitioner
Hector Saucedo-Mesa
345 Park Avenue
New York, New York 10154
(212) 888-0100

Dated: New York, New York
August 19, 1991

SW
St. Louis & Westervelt, Inc. (2955)
NY (212) 684-3117 NJ (201) 863-8133

QUESTIONS PRESENTED

1. Whether a defendant can be convicted of 21 U.S.C. Section 860(a) (formerly codified at 21 U.S.C. §845a), which provides an enhanced penalty for any person for "possessing with intent to distribute... a controlled substance in or on, or within a thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school... or a playground... or within 100 feet of a... public swimming pool," *absent* proof that the defendant intended to make the actual distribution within the proscribed area.

2. Whether the sentencing judge committed error of constitutional magnitude by holding petitioner accountable, under the federal Sentencing Guidelines, for 10 kilograms of cocaine in light of the fact that the same judge had dismissed the accusation relating to such charge at the conclusion of the Government's case at trial.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
Table of Authorities	*iv*
Opinion Below	2
Jurisdiction	2
Statement of The Case	
A. Procedural History	3
B. Statement of Facts	
A. The Trial	
(1) The Government's Proof at Trial	5
(2) The Defense Case	8
(3) The District Court's Rulings on Defense Motions For Judgments of Acquittal	8
(4) The Verdict	10
B. Pre-Sentence Report; Trial Counsel's Objections	10
C. The Sentencing Hearing	13

Contents

Page

Reasons For Granting The Writ 14

Point I

Petitioner Saucedo's Conviction Should be Reversed on Both Counts Since He Did Not Intend to Distribute Cocaine in a Prohibited Location 15

Point II

Saucedo's Sentence Should Be Vacated Because The District Judge Misapplied The Sentencing Guidelines 20

Conclusion 22

APPENDIX A

Judgment And Decision of The United States Court of Appeals For The Fifth Circuit, Entered May 22, 1991 ..... 1a

Contents

Page

TABLE OF AUTHORITIES

Cases Cited:

Cabana v. Bullock,
474 U.S. 376, 384 (1986) 18

Duncan v. Louisiana,
391 U.S. 145 (1968) 18

United States v. Buenrosto,
868 F.2d 135 (5th Cir. 1989) 20

United States v. Edgecomb,
910 F.2d 1309 (6th Cir. 1990) 18

United States v. Foley,
906 F.2d 1261 (8th Cir. 1990) 17

United States v. Juarez-Ortega,
866 F.2d 747 (5th Cir. 1989) 21

United States v. Lawrence,
915 F.2d 402 (8th Cir. 1990) 21

United States v. Liranzo,
729 F. Supp. 1012 (S.D.N.Y. 1990) 15, 16,
..... 17

United States v. Merkt,
764 F.2d 266 (5th Cir. 1985) 18, 19

Contents

Page

Cases Cited: (continued)

United States v. Rivera,
898 F.2d 442 (5th Cir. 1990) 20

United States v. Robbins,
629 F.2d 1105 (5th Cir. 1980) 21

United States v. Roberts,
735 F. Supp. 537 (S.D.N.Y. 1990) 15, 17

United States v. Rogers,
918 F.2d 207 (D.C. Cir. 1990) 18

United States v. Saucedo-Mesa, et ano.,
Dkt. No. 90-8498 (5th Cir. May 22, 1991) 4

United States v. Walton,
908 F.2d 1289 (6th Cir. 1990) 21

Statutes, Laws, Rules And Other Authorities Cited:

Title 21 U.S.C. §841(a)(1) 3, 4, 15
§845a 3, 4, 15
§846 ..... 3, 4
§856 15
§860(a) (formerly 845a(a) ..... *ii*, 14

Title 28 U.S.C. §1254(1) 2

Contents

Page

Statutes, Laws, Rules And Other Authorities Cited:
(continued)

Fed. R. Crim. P. 29 ..... 8, 20

134 Cong. Rec. S15785-01 at §2254 (1988) 16

Application Note 1 to Sentencing Guideline 2D1.4... 11, 12
..... 13, 21

No. 91 -

In The

Supreme Court of the United States

October Term, 1991

HECTOR SAUCEDO-MESA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Hector Saucedo-Mesa respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on May 22, 1991.

OPINION BELOW

The opinion of the Fifth Circuit is not officially reported.

JURISDICTION

This judgment of the court of appeals was entered on May 22, 1991. A copy of the opinion is annexed as Appendix A. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural History

On March 7, 1990, Indictment 90-CR-100H was filed in the United States District Court for the Western District of Texas, El Paso Division, charging defendants Saucedo and two co-defendants named Jose Cesario Torres-Mendoza (hereinafter, "Torres") and Ildefonso Valenzuela-Proano (hereinafter, "Valenzuela") in four counts of federal narcotics violations.

Count One of the indictment alleged that on February 15, 1990, the three defendants unlawfully possessed with intent to distribute more than 500 grams of cocaine within 1000 feet of the real property of the Father Yermo Elementary and High School, in El Paso, and within 100 feet of El Paso's Washington Park, which contains within its boundaries playgrounds and a swimming pool, in violation of 21 U.S.C. §§ 841(a)(1) and 845a. Count Two accused the defendants of conspiring on February 15, 1990 to possess more than 500 grams of cocaine with intent to distribute it within 1000 feet of the real property of the Father Yermo School and within 100 feet of Washington Park, in violation of 21 U.S.C. §§841(a)(1), 845a, and 846.

Count Three charged the three defendants with conspiring on February 15, 1990 to distribute more than 500 grams of cocaine within 1000 feet of the Father Yermo School and within 100 feet of Washington Park, in

violation of 21 U.S.C. §§841(a)(1), 845a, and 846. Count Four accused the three defendants of conspiracy to distribute *more than five kilograms* of cocaine within 1000 feet of the Father Yermo School and within 100 feet of Washington Park, in violation of 21 U.S.C. §§841(a)(1), 845a, and 846.

The defendants proceeded to trial on June 27, 1990, and were convicted by a jury that day of Counts One and Two, the last two Counts having been dismissed at the conclusion of the Government's case. On August 24, 1990, Saucedo was sentenced to a term of 151 months imprisonment, to be followed by eight years supervised release.

The Fifth Circuit affirmed Saucedo's judgment of conviction. *United States v. Saucedo-Mesa, et ano.*, Dkt. No. 90-8498 (5th Cir., May 22, 1991). The court of appeals concluded that it was not required to decide Saucedo's constitutional challenge to Section 845a since "sufficient evidence supports the jury's verdict under the reading of the statute more favorable to the defendants." *Id.* at 5. The Fifth Circuit also concluded that the District Judge had not erred at sentence by considering amounts in excess of the cocaine actually seized despite the fact that the district court dismissed count four of the indictment, which charged amounts beyond those seized. *Id.* at 9-10.

B. Statement of Facts

A. The Trial

(1) The Government's Proof At Trial

The Government's proof at trial, consisting of the testimony of a number of witnesses and the admission of several exhibits, depicted a one-kilo transaction on February 15, 1990, in El Paso Texas. On that day, after meeting with a confidential informant and fellow agent Stephen Perkins, Raul Morales, an agent for the Drug Enforcement Administration ("DEA") formulated plans whereby he would be introduced by the informant to a number of Hispanic men in El Paso, as a prospective purchaser of cocaine. Although the informant told the DEA agents that the dealers wanted to meet at the Good Luck Cafe in El Paso, agent Perkins selected Chico's Tacos as a safer location at which to conduct the meeting. (Tr. 8, 20-22, 25-27, 48).[1]

In preparation for the meeting, DEA agents searched the informant for any contraband of weapons (there were none). Agent Morales then drove the informant to the Good Luck Cafe and told him to bring the dealers to Chico's Tacos for the meeting. Agent Morales proceeded to Chico's Tacos; about five minutes later, the informant, accompanied by Saucedo and Valenzuela, arrived (Tr. 9-12, 28, 38, 43, 71-72).

---

[1] References to "Tr. " are to the trial transcript.

The four men sat at a booth near the restaurant's plate-glass window. Morales asked whether Saucedo could help him obtain some cocaine. Saucedo responded affirmatively, quoting a price of $17,500 per kilo which, though high was a good value since it was "rock" cocaine -- *i.e.*, it was cocaine that had not been "cut" with dilutants. Morales stated he wanted to purchase between one and ten kilograms. Saucedo replied that his drug source had given him only one kilo, which Saucedo had been unable to sell; Saucedo added "How can I sell you ten when I can't sell the one I have." Nonetheless, Saucedo maintained that he could furnish Morales with any quantities he needed "as long as you have the cash money." (Tr. 13-14, 28).

Morales said he might be able to quickly purchase the one kilo Saucedo had mentioned if it was in the immediate area. Saucedo replied that he didn't know whether he could show it to Morales, and that Saucedo would "have to ask the owner." (Tr. 15-16, 23, 30-31).

After about 20 minutes of conversation, as Saucedo was stepping away form the booth, Morales asked him whether he could deliver ten kilos per week. Saucedo answered: "Sure, but you have to buy this one kilo. We can't do anything unless I sell you this one kilogram of coke. You can have whatever you want as long as you have cash." (Tr. 15).

Soon thereafter, Saucedo returned to the booth and said that Morales could view the cocaine, which was nearby in a burgundy Monte Carlo. Morales exited the

restaurant and went to the Monte Carlo, Texas license plate number 931 UBK, which was parked nearby, against a fence. Morales tried to open the driver's door but it was locked. He started to return to the restaurant when he was approached by defendant Torres who asked Morales whom he was looking for. Morales answered that he was looking for a friend in a Monte Carlo. Torres then walked past Morales, who returned to Chico's Tacos. (Tr. 16, 61, 58).

Morales was returning to the restaurant, when Saucedo, Valenzuela and the informant stopped him; they instructed Morales to return to the Monte Carlo. When Morales returned again to the vehicle, Torres was standing by the car, and said, "Well, come over." Morales went to the passenger's side and Torres told him to enter. The door proved to be unlocked this time and Morales got in. On a hump where the drive shaft would ordinarily be was a K-Mart plastic bag, inside of which was a flat, block, white substance that was hermetically sealed in a clear bag. Based upon his experience, Morales presumed the substance to be cocaine from its appearance and acidic smell. Torres stated that the substance was "puro, puro. Pure rock." Torres then asked Morales, "Do you like it?" Morales responded that he did. Morales briefly examined the rock-like substance; then, as he exited the car, Morales gave a prearranged arrest signal, and the defendants were placed under arrest. (Tr. 16-18, 58, 73-74).

After the arrest of the defendants, DEA agent Sullivan conducted a field test of the substance found in the K-Mart bag. It reacted positively for cocaine. (Tr. 59,

64-65). On his ride to the DEA office, Saucedo told the agents that "I don't know anyone. I was just drinking some coffee. I'm just a mechanic." (Tr. 74-75).

Testimony by Government witnesses established that Chico's Tacos is approximately 900 feet from the Father Yermo School and about 55 feet from El Paso's Washington Park, and its playgrounds. (Tr. 82-83, 90-92). The Government also proved that the substance seized from the Monte Carlo, which was registered to Torres and his wife, (Tr. 98), was 1003 grams of high purity cocaine, with a "street" value of between $80,000 and 120,000. (Tr. 87, 100-01).

(2) The Defense Case

Defendant Saucedo did not testify and presented no evidence on his behalf.

(3) The District Court's Rulings on Defense Motions For Judgments of Acquittal

At the conclusion of the Government's case United States District Judge Harry Lee Hudspeth, in ruling on defense motions, pursuant to Fed. R. Crim. P. 29, for judgments of acquittal, participated in the following colloquy with the attorneys:

> THE COURT: Well, I think as to Counts 1, 2, and 3, there is sufficient evidence to

raise jury question about all the elements of those offenses charged in those three counts.

I am a little concerned about the Count 4, the one that accuses the defendants of conspiring to distribute five or more kilograms of cocaine. I am just not sure I caught the evidence that they conspired to do that. What evidence is there about that?

MR. GALENSKI [Prosecutor]: They talked about doing ten kilos at the meeting. "Buy one kilo and we will deliver ten kilos from that point on," is the way I recall the testimony from Agent Morales.

THE COURT: What do you recall, Mr. Ramos?

MR. RAMOS [Saucedo's trial counsel]: Yes, Your Honor.... I believe that there was testimony that there was a conversation between Mr. Saucedo and the undercover agent regarding additional amounts. I don't think there was any testimony about any conversation or negotiations between Mr. Saucedo or any other defendants or any other agents. And I think he cannot conspire with an undercover agent. And I don't think, then, the evidence is sufficient to support this count.

....

MR. GALENSKI: Maybe I can make it easy. I didn't draft this indictment, in [sic] I was planning on abandoning the 3rd and 4th Count and making it simple for the jury and just going on the 1st and the 2nd Count. You know, cutting it down and making it

> simpler. One and Two or [sic] more than sufficient.
>
> ....
>
> THE COURT: You are going to agree to dismissing Counts 3 and 4?
>
> MR. GALENSKI: Yes, sir. I think it would make it a lot simpler for everybody.
>
> THE COURT: That motion is granted to Counts 3 and 4, but the motion for acquittal on Counts 1 and 2 is overruled. I think there is evidence sufficient to go the jury on that.

Tr. 105-07.

(4) The Verdict

After deliberating a short period of time, the jury returned a verdict convicting all three defendants of Counts 1 and 2. (Tr. 163).

B. Pre-Sentence Report; Trial Counsel's Objections

Relying on double hearsay and referring to events that anteceded the Government's proof at trial, the pre-sentence investigation ("PSI") report stated that the defendants were storing and distributing large amounts of marijuana and cocaine received from their suppliers, Mexican police officer who "had access to drugs which had been seized by the police." PSI report at 3. The PSI

report then alleged that Saucedo was willing to sell kilos of cocaine at $17,500 per kilo, to the putative buyer, agent Morales. *Id.*

The PSI report described the Base Offense Levels under the Sentencing Guidelines as follows. As to Count One, the conviction for substantive possession of cocaine with intent to distribute within 1000 feet of the Father Yermo School and 100 feet of Washington Park, the "quantity of cocaine involved was 1.003 kilograms. *Id.* at 7. The PSI report then stated, as to Count Two, the conviction for conspiracy, the "quantity of cocaine involved was 10.000 kilograms (including the 1.003 kilograms involved in Count I." *Id.* The PSI report calculated that the "combined base offense level, based on the aggregate quantity of 10.000 kilograms is [base offense level] 34." *Id.*

Since Saucedo had no adjustments to the offense level, his Adjusted Offense Level was calculated to be level 34. Because Saucedo had no prior convictions, he fell within Criminal History Category I. Based upon a total offense level of 34 and a Criminal History Category of I, the guideline imprisonment range for Saucedo was computed to be 151 to 188 months. Further, the supervised release term was calculated to be not less than eight years on each count.

Trial counsel for Saucedo objected to the PSI report's computation of the applicable offense level. Citing Application Note 1 to Sentencing Guideline 2D1.4, trial counsel alleged:

> [I]n a case where a defendant is convicted of an offense involving negotiation to traffic in a controlled substance, if the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the Court shall exclude from the guideline calculation the negotiated amount.
>
> It is clear from the testimony at the trial that Defendant Saucedo-Mesa does not possess the experience nor the sophistication of a drug trafficker that could be reasonably capable of producing any 10 kilograms amount of cocaine.

Accordingly, Saucedo's trial counsel sought to exclude the 10 kilograms from the Guideline calculation. Separately, trial counsel for Saucedo complained that the PSI report did not recommend a two-level downward adjustment for acceptance of responsibility.

In a three-page Addendum, the probation officer who authored the initial PSI report responded to the objections of Saucedo's trial counsel. She sidestepped the issue raised under Guideline Section 2D1.4, Application Note 1, and instead stated that the "offense conduct clearly shows that Saucedo-Mesa participated in a reasonably foreseeable transactions for ten kilograms of cocaine. 1B1.3(a) and application notes [sic] 1." Addendum at 2. The Addendum also rejected Saucedo's request for a two-level reduction for acceptance of responsibility.

C. The Sentencing Hearing

At sentencing, Saucedo's trial counsel reiterated his objections, to wit, that Saucedo should not be held responsible, pursuant to Application Note 1 to Guideline Section 2D1.4, for the 10 kilograms under discussion; and that Saucedo was surprisingly denied a two-level reduction for acceptance of responsibility.

Judge Hudspeth denied the entreaties of trial counsel for Saucedo and sentenced him concurrently on both Counts to a term of 151 months imprisonment, to be followed by eight years supervised release.

REASONS FOR GRANTING THE WRIT

This petition raises recurring and important issues not previously resolved by this Court: (1) Whether a defendant should be found guilty of violating 21 U.S.C. §860(a), where he did not possess cocaine with intent to distribute it within 1000 feet of a prohibited area, as is required under Section 860(a); (2) Whether a defendant's sentence should be vacated and remanded in a situation where the District Judge improperly held him accountable for 10 kilos of cocaine, whereas the *same* Judge had earlier dismissed the charge relating to that accusation for insufficiency.

POINT I

PETITIONER SAUCEDO'S CONVICTION SHOULD BE REVERSED ON BOTH COUNTS SINCE HE DID NOT INTEND TO DISTRIBUTE COCAINE IN A PROHIBITED LOCATION.

The proof adduced by the Government at trial clearly showed that defendant-appellant Saucedo (and the other defendants) did not possess the cocaine with intent to *distribute it within* 1000 feet of the Father Yermo School or within 100 feet of Washington Park. Instead the evidence demonstrated that the defendants *and* the undercover agents originally intended to have merely a *meeting* (*see* Tr. 15-17, 22-25, 30, 45-48) at the Good Luck Cafe (*see* Tr. 9, 20-21, 25-26, 34, 38), which was not within the prohibited zone. That location was changed, to come within the prohibited area, at the instance of government agents. (Tr. 9, 20-26, 34, 48). In such circumstances, Saucedo's conviction on both Counts should have been reversed. *See United States v. Liranzo*, 729 F. Supp. 1012 (S.D.N.Y. 1990) (Section 845a conviction set aside where defendant arrested with drugs within 1000 feet of school absent evidence he intended to *distribute* within 1000 feet of school); *accord*, *United States v. Roberts*, 735 F. Supp. 537 (S.D.N.Y. 1990).

Title 21 U.S.C. § 860(a) (formerly 845a(a) or the "schoolyard statute") provides an enhanced penalty for:

> Any person who violates section 841(a)(1) or section 856 of this title by distributing, possessing with intent to distribute, or

> manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary... school... or within 100 feet of a playground... [or] public swimming pool...

When first enacted in 1984, the schoolyard statute provided an enhanced penalty for *distributing* drugs within 1000 feet of a school. In 1986, Congress amended the scope of the schoolyard statute, *inter alia*, to insert "manufacturing" after "distributing." In 1988 Congress again amended the statute to insert ", possessing with intent to distribute," after "distributing." 134 Cong. Rec. S15785-01 at §2254 (1988). That amendment also created an additional 100-foot protective zone that included playgrounds and public swimming pools. There is no legislative history accompanying the amended schoolyard statute.

Noting the absence of Congressional intent, the court in *Liranzo* concluded that in order to be convicted under the "possession" portion of Section 860(a), the defendant had to intend to *distribute within 1000 feet* of a school, and not merely *possess within 1000 feet* of a school, with intent to distribute elsewhere

> [T]here is no policy reason to conclude that Congress sought to punish those possessing a controlled substance within 1,000 feet of a school, but intending to distribute it elsewhere.

United States v. Liranzo, 729 F. Supp. at 1014.

The reasoning the *Liranzo* court was directly

followed by the district court in *United States v. Roberts*. There, distinguishing decisions in which convictions were upheld for *distribution* within 1000 feet of a school absent intent, the court stated:

> [Defendant] Roberts need not have intended to distribute the drugs in any particular geographic location, nor does he need to know that he is distributing within 1000 feet of a school. Instead, the government need only show that the *location where Roberts did intend to distribute the drugs was actually 1000 feet of a school.*

United States v. Roberts, 735 F. Supp. at 542 (emphasis added).

Although the *Liranzo* and *Roberts* decisions are certainly not binding on this Court, it is respectfully submitted that their reasoning is persuasive in the case at bar. Here, as noted above, there was no intent to *distribute* the cocaine at a location within 1000 feet of a prohibited area. Instead, the intent was to make the distribution at a different location, the Good Luck Cafe in El Paso, Texas; that location was changed at the suggestion of the agents. (*See* Tr. 9, 20-26, 34, 48). Recently other courts of appeals have condemned actions by law enforcement agents to foster and/or enhance the criminal activities of defendants. In *United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990), the court observed:

> We should not countenance allowing the government to manufacture conduct or negotiation without some evidence of knowing participation by the defendant in

that conduct or negotiation.

Id. 906 F.2d at 1265. *See also United States v. Edgecomb*, 910 F.2d 1309 (6th Cir. 1990).

Here, the agents clearly created the situation that permitted the defendants to violate the schoolyard statute.

It is axiomatic that a defendant charged with a serious crime has the right to have a jury determine his guilt or innocence. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Thus, a "jury's verdict *cannot stand* if the instructions provided the jury do not *require* it to find *each element of the crime* under the proper standard of proof." *Cabana v. Bullock*, 474 U.S. 376, 384 (1986) (emphasis added; citation deleted). *See also United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985) (reversal where jury not fully instructed as to defendant's intent, since "government's problems of proof do not warrant an instruction that removes one of the essential elements of the offense from the jury's consideration").

In this respect the instant case is readily distinguishable from *United States v. Rogers*, 918 F.2d 207, (D.C. Cir. 1990), relied upon by the Fifth Circuit in its decision below. In *Rogers*, the district court, in supplemental instructions *did* not properly charge the jury, over the government's objection:

> The defendant "has to have the intent to distribute within a thousand feet of a school . . ., and if he is found near a school with the intent to distribute drugs some other

place, that is not a violation of the statute."

Id., 918 F.2d at 213. Obviously, the foregoing clarification was never given to the jury in Saucedo's case. Instead, the Government in the case at bar, as in *Merkt*, has attempted to divine Saucedo's intent from evidence it adduced at trial. Accordingly, Saucedo's conviction should be reversed on Count One.

For similar reasons, Saucedo's conviction on Count Two, the conspiracy charge, should be reversed. There was no proof that the defendants conspired to possess with intent to *distribute* within 1000 feet of a prohibited location.

POINT II

SAUCEDO'S SENTENCE SHOULD BE VACATED BECAUSE THE DISTRICT JUDGE MISAPPLIED THE SENTENCING GUIDELINES.

A district court's findings about the quantity of drugs implicated by the crime are factual findings reviewed under "clearly erroneous" standard. *United States v. Rivera*, 898 F.2d 442, 445 (5th Cir. 1990). The district court's sentence will be upheld so long as it results from a correct application of the Guidelines to factual findings that are not clearly erroneous. *United States v. Buenrosto*, 868 F.2d 135, 136-37 (5th Cir. 1989). On the other hand, where the District Judge's findings are grounded on insufficient facts, or are inconsistent with the record, the sentence should be vacated and remanded. *United States v. Rivera*, 898 F.2d at 445-46. Applying the foregoing principles here, it is clear that Judge Hudspeth clearly erred in sentencing Saucedo to 151 months imprisonment; consequently, the sentence must be vacated.

At the outset, it bears emphasis that Judge Hudspeth dismissed pursuant to Fed. R. Crim. P. 29, Counts Three and Four at the conclusion of the Government's case - - with the *acquiescence of the Government.* (*See* Tr. 105-07). It is clear that the District Judge advocated dismissing Count Four (conspiracy to possess with the intent to distribute more than *five kilos* of cocaine, in violation of schoolyard statute) since he believed the evidence was insufficient to warrant jury submission of a charge that the defendant conspired to distribute more than five kilos of cocaine. *Cf. United States*

v. Robbins, 629 F.2d 1105 (5th Cir. 1980).

While a sentencing judge is permitted to rely on facts underpinning a charge for which a defendant has been acquitted, if it *believes those facts to be reliable, see United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989), it is clearly erroneous and indeed unconscionable to enhance a defendant's sentence on the basis of facts which the sentencing court had earlier determined were *insufficient. See United States v. Rivera*, 898 F. 2d 445-46; *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990) (Guidelines prohibit allowing sentencing courts to hold defendants responsible for specific quantities unless factual basis exists); *United States v. Lawrence*, 915 F.2d 402, 409 (8th Cir. 1990) (same).

Here, Application Note 1 to Sentencing Guideline 2D1.4 states in pertinent part:

> [W]here the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

It is submitted that by dismissing Count Four of the indictment - - upon the application of the prosecution - - Judge Hudspeth implicitly made a finding that Saucedo was incapable of producing the 10 kilos he had "puffed" about. Accordingly, it was clear error for the District Judge later to include those amounts in the Guideline computation.

CONCLUSION

For the foregoing reasons, Saucedo's conviction should be reversed on Counts One and Two since he did not possess with intent to *distribute* within 1000 feet of a prohibited area. Saucedo's sentence should be vacated and remanded since the District Judge improperly held him accountable for 10 kilos of cocaine, whereas the District Judge had earlier dismissed the charge relating to that accusation for insufficency.

Dated: New York, New York
August 19, 1991

Respectfully submitted,

RICHARD B. LIND
McCOSTIS & LIND
Attorneys for the Petitioner
Hector Saucedo-Mesa
345 Park Avenue
New York, New York 10154
(212) 888-0100

No. 91 -

In The

Supreme Court of the United States

October Term, 1991

HECTOR SAUCEDO-MESA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

APPENDIX A - JUDGMENT AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ENTERED MAY 22, 1991 [PP. 1a - 12a]

No. 90-8498
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-versus-

HECTOR SAUCEDO-MESA, JOSE CESARIO TORRES-MENDOZA,

Defendants-Appellants.

Appeals From the United States District Court for the Western District of Texas
(EP-CR-90-100-H)

(May 22, 1991)

Before CLARK, Chief Judge, KING and GARWOOD, Circuit Judges.

PER CURIAM:*

Hector Saucedo-Mesa and Jose Torres-Mendoza both appeal their conviction and sentencing for violation of 21 U.S.C. §§ 841(a)(1), 845a, and 846. We affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

APPENDIX A

[Judgment and Decision - USCA (Fifth Cir. 1991)]

I

A confidential informant related to Agent Steven Perkins of the Drug Enforcement Agency that some Hispanic males wished to sall cocaine in large quantities. The cocaine suppliers wanted to meet at the Good Luck Cafe in El Paso, Texas. Perkins instead made arrangements to meet at Chico's Tacos, believing it to be a preferable location for surveillance and for protection of Agent Raul Morales, who was to be the undercover agent.

At the designated time, Morales dropped the confidential informant at the Good Luck Cafe, instructing him to bring the dealers to Chico's Tacos. Morales proceeded to the location, where several other agents served as back-up. The confidential informant entered with two Hispanic males, later identified as Hector Saucedo-Mesa and Ildelfonso Valenzuela. The four of them sat down in a booth. Morales asked Saucedo-Mesa if he could help get cocaine for him, indicating he arranged the meeting to find out the price. Saucedo-Mesa responded that he could, and that the cocaine would cost $ 17,500 per kilogram. Saucedo-Mesa assured Morales that the high price was justified due to the purity of the rock cocaine he was offering.

Morales stated he wished to purchase up to ten kilograms of cocaine. Saucedo-Mesa replied that his drug source had given him one kilo to sell, which he had not yet successfully accomplished, adding, "How can I sell you ten when I can't sell the one I have?" Saucedo-Mesa then stated that if the agent could buy the one kilogram he

then had, "I can get you whatever you want as long as you have the cash money." Morales specifically asked Saucedo-Mesa if he could supply ten kilograms of cocaine on a weekly basis, and Saucedo-Mesa answered in the affirmative, so long as they concluded the one kilo sale at that point. Morales, who had not anticipated an actual deal at this meeting, indicated that he had the money close by in a place for "safe keeping." Morales stated he would help Saucedo-Mesa by calling for the money and purchasing the one kilogram if Saucedo-Mesa could show that the drugs were in the immediate area. Saucedo-Mesa replied that he did not know if he could show the cocaine, but would have to ask "the owner."

Saucedo-Mesa left the table. He returned shortly thereafter and informed Morales that he could view the cocaine. Saucedo-Mesa directed the agent to proceed outside and look for a red Monte Carlo automobile. Morales went outside and saw an unoccupied red Monte Carlo, but the door was locked. Jose Torres-Mendoza approached Morales and engaged him in conversation. Torres-Mendoza eventually unlocked the car and directed Morales to enter. Torres-Mendoza sat in the driver's seat beside Morales and stated "it's in the floor." A plastic bag sat on the top of the drive shaft hump. Morales recognized the substance in the bag to be rock cocaine. Torres-Mendoza stated, "Puro, puro. Pure rock. Do you like it?" Morales indicated in the affirmative. When exiting the vehicle, Morales gave a prearranged arrest signal.

The substance in the bag was found to be 1003 grams of 97 percent pure cocaine hydrochloride. The Monte Carlo was registered to Jose Torres-Mendoza. Chico's Tacos, where the arrest was made, is located approximately 55 feet from a public park and swimming pool and approximately 900 feet from an elementary and high school.

Saucedo-Mesa and Torres-Mendoza were brought to trial under a four-count indictment. They were each charged with the substantive offence of possession with intent to distribute more than 500 grams of cocaine within 1000 feet of an elementary and high school, and within 100 feet of a public park containing playgrounds and a swimming pool, in violation of 21 U.S.C. §§ 841(a)(1) and 845a (count one). The indictment also charged three conspiracies related to their actions within the same proximity to the school and park, all in violation of 21 U.S.C. §§ 841(a)(1), 845a, and 846: conspiracy to possess more than 500 grams of cocaine (count two); conspiracy to distribute more than 500 grams of cocaine (count three); and conspiracy to distribute more than five kilograms of cocaine (count four).

At the close of the government's case, the district court granted the government's motion to dismiss counts three and four. Saucedo-Mesa and Torres-Mendoza were convicted of counts one and two. Each was sentenced to two concurrent terms of 151 months to be followed by two concurrent terms of eight years supervised release, and a special assessment of $ 100.00.

II

A

Both defendants challenge the applicability of 21 U.S.C. § 845a to their conduct. This statute provides an enhanced penalty for any person for "possessing with intent to distribute . . . a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school . . . or a playground . . . or within 100 feet of a . . . public swimming pool." 21 U.S.C. § 845a(a) (recodified at 21 U.S.C. § 860(a)).

The defendants point to several district court decisions from the Southern District of New York which hold that an enhancement for possession with intend to distribute under this statute requires that the defendant intend to make the actual distribution within the proscribed area. *United States v. Liranzo*, 729 F.Supp. 1012, 1014 (S.D.N.Y. 1990); *United States v. Roberts*, 735 F.Supp. 537, 539 (S.D.N.Y. 1990) *United States v. Coates*, 739 F.Supp. 146, 153 (S.D.N.Y. 1990). On the other hand, the government suggests a broad interpretation of this statute, arguing that possession within the zone with the intent to distribute anywhere in the world falls within the ambit of the enhancement.

We need not decide here which interpretation of § 845a is correct. The district court's instruction on both counts tracked the exact language of § 845a. Sufficient

evidence supports the jury's verdict under the reading of the statute more favorable to the defendants. *See United States v. Rogers*, 918 F.2d 207, 214 (D.C.Cir. 1990). Saucedo-Mesa and Torres-Mendoza brought the kilo of rock cocaine to the initial meeting with the intent to try to sell it at that meeting with Morales at Chico's Tacos. Saucedo-Mesa, not Morales, introduced and insisted upon their desire to conclude an introductory sale at that point in time at a location they concede to be within the proscribed area.

This statute does not require that the defendants know they are within the zone, *United States v. Ofarril*, 779 F.2d, 791, 792 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986), nor does it require distribution to students or children whom Congress presumably chose to protect by this enhancement. *United States v. Jones*, 779 F.2d 121, 123 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1031 (1986). We have upheld this "irrebutable presumption" from due process and equal protection challenges. *United States v. Crew*, 916 F.2d 980 (5th Cir. 1990). As such, conviction and enhancement of sentence under this provision was proper.

Both defendants also argue that they were, in effect, "entrapped" by the government insofar as application of § 845a applies to their conduct. They point out that they arranged to meet Morales at The Good Luck Cafe, some 3000 feet east of Chico's Tacos. It was the government agents, they argue, that chose a location within the proscribed area. The district court instructed the jury on this entrapment theory, properly stating that the critical

determination regarding entrapment is whether the criminal intent originated with the defendants or with government agents. *United States v. Duvall,* 846 F.2d 966, 974 (5th Cir. 1988). Uncontroverted testimony by the agents indicate that Chico's Tacos was chosen for practical reasons of surveillance and agent safety. Morales had anticipated that the meeting at Chico's Tacos was only to attempt to reach agreement on a later transaction. It was Saucedo-Mesa who first expressed a desire to conclude a preliminary transaction immediately and on those premises. This evidence was sufficient to overcome any concern that the agents entrapped these defendants, or that they were somehow unwilling to traffic narcotics in disregard of §845a.

Torres-Mendoza also argues that the evidence was generally insufficient to support his conviction for possession with intent to distribute narcotics. This argument lacks merit. He owned the vehicle containing the contraband, and specifically showed the rock cocaine to the agent, while stating, "Puro. Puro. Pure rock. Do you like it?" His argument that this was somehow ambiguous regarding his knowing possession of narcotics with the intent to distribute will not be countenanced further. *United States v. Villasenor,* 894 F.2d 1422, 1426 (5th Cir. 1990). A rational trier of fact could have found the essential elements of the offense in question beyond a reasonable doubt. *Id.* at 1425.

Regarding the conspiracy charge, Torres-Mendoza argues that no evidence was presented to show he was privy to or had knowledge of the conversations between

Morales and Saucedo-Mesa. However, the defendant need not know every detail of the conspiracy. *United States v. Fernandez-Roque*, 703 F.2d 808, 814-15 (5th Cir. 1983). Furthermore, every element of conspiracy may be made by circumstantial evidence. *United States v. Espinoza-Seanz*, 862 F.2d 526, 537 (5th Cir. 1988). That evidence here showed that Saucedo-Mesa left to discuss a possible viewing of the cocaine with its "owner." Morales was then directed to Torres-Mendoza outside, who escorted him into the car and showed him the cocaine. A rational trier of fact could have found that he knowingly and voluntarily participated in a conspiracy to violate the narcotics laws. *United States v. Kaufman*, 858 F.2d 994, 999 (5th Cir. 1988).

B

Both defendants argue that the district court misapplied the sentencing guidelines. As a narcotics case, the sentence was largely based on findings concerning the amount of drugs involved in the offense conduct, which are subject to review under the "clearly erroneous" standard. *United States v. Thomas*, 870 F.2d 174, 176 (5th Cir. 1989).

The district court based its sentence on ten kilograms of cocaine (including the one kilogram recovered) due to the parameters of the negotiations between Saucedo-Mesa and Morales. Torres-Mendoza argues that any amount over the kilogram recovered cannot be attributed to him because he did not participate in these negotiations. "The guidelines make clear that in drug distribution cases quantities of drugs not specified in the count of conviction are to be included in determining the base offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." *United States v. Byrd*, 898 F.2d 450, 452 (5th Cir. 1990) (citing U.S.S.G. § 1B1.3). In cases of criminal activity taken in concert with others, a defendant is accountable for all reasonably foreseeable conduct, U.S.S.G. § 1B1.3, comment (n.1), which must be demonstrated by a preponderance of the evidence. *United States v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 792 (1991).

The evidence demonstrate that Torres-Mendoza was not merely on the periphery of these negotiations. He controlled the kilogram seized, and was considered by Saucedo-Mesa to be its "owner." The presentence report upon which the district court relied determined Torres-Mendoza to be Saucedo-Mesa's supplier. Where a defendant does not present relevant evidence in rebuttal, the district court is free to adopt the findings in the presentence report. *United States v. Mueller,* 902 F.2d 336, 346 (5th Cir. 1990). Torres-Mendoza makes no argument based in fact or law to show this reliance to be clearly erroneous.

Saucedo-Mesa argues the district court clearly erred in considering amounts in excess of the cocaine actually seized because the district court dismissed count four of the indictment, which charged amounts beyond those seized. He argues that the district court dismissed this charge upon determining at the close of the government's case that the evidence was insufficient. However, the court stated only that it was "a little concerned about Count 4," and then granted the government's motion to dismiss. This does not support Saucedo-Mesa's contention that any findings concerning other contemplated transactions were insufficient or unreliable. A judge may consider conduct for which the defendant has not been convicted. *Woods, supra,* 907 F.2d at 1543. Differing standards of proof are necessary to support conviction and to support sentencing findings. Matters relevant to sentencing require findings by only a preponderance of the evidence, subject to review for clear error. *Id.* The guidelines specifically comprehend findings concerning drug seizures that do not accurately

portray the scope of a conspiracy, particularly in regard to weights under negotiation during an uncompleted distribution. U.S.S.G. § 2D1.4, comment (nn. 1 & 2). The district court could find that Saucedo-Mesa's assertions were not mere "puffing." The amount and purity of cocaine that he had readily available indicated a large source of cocaine.

Saucedo-Mesa lastly argues that his base offense level should have been 32, and not 34 as found by the district court. However, because the narcotics offense occurred near a protected location, the guidelines required the addition of two levels. U.S.S.G. § 2D1.2(a)(1). Saucedo-Mesa's calculations apparently overlooks this provision.

III

The judgment of the district court is

AFFIRMED.